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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 TOMEKO MALONE,

12 Petitioner,

13 v.

14 ROSEANNE CAMPBELL, Warden,

15 Respondent.
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Civil No. 08cv0159-IEG (CAB)

**ORDER DISMISSING PETITION
WITHOUT PREJUDICE TO
PETITIONER TO PROCEED WITH
HIS CLAIMS IN SO. DIST. CA CIVIL
CASE NO. 06cv0169-DMS (RBB)**

17 Petitioner is a state prisoner proceeding pro se with a Petition for a Writ of Habeas
18 Corpus pursuant to 28 U.S.C. § 2254. Petitioner claims that his federal due process rights were
19 violated when he was sentenced following his conviction for two counts of assault with a deadly
20 weapon in San Diego Superior Court case number SCD171069. (Pet. at 1-2.) Specifically,
21 Petitioner contends the trial judge failed to hold a hearing prior to sentencing in order to
22 determine whether Petitioner could afford to pay the restitution fine imposed, and that he
23 received ineffective assistance of counsel when his attorney failed to object to the imposition of
24 the restitution fine and failed to challenge the restitution on direct appeal. (Pet. at 6-8.)


25 Petitioner is currently proceeding with a habeas action in this Court in which he
26 challenges his conviction in San Diego Superior Court case number SCD171069. (See First
27 Amended Petition filed 8/3/06 [Doc. No. 19] in SO. DIST. CA CIVIL CASE NO. 06CV0169-DMS
28 (RBB).) On December 14, 2007, the assigned Magistrate Judge issued a Report and

1 Recommendation in that case which recommended that judgment be entered denying the First
2 Amended Petition on the merits of the claims presented. (See Report & Recommendation filed
3 12/14/07 [Doc. No. 33] in SO. DIST. CA CIVIL CASE NO. 06CV0169-DMS (RBB).) Petitioner
4 filed Objections to the Report and Recommendation on January 24, 2008. (See Objections filed
5 1/24/08 [Doc. No. 37] in SO. DIST. CA CIVIL CASE NO. 06CV0169-DMS (RBB).) A Reply to
6 Petitioner's Objections is due on or before February 14, 2008. (See Doc. No. 36 in SO. DIST. CA
7 CIVIL CASE NO. 06CV0169-DMS (RBB).)

8 Because Petitioner is currently proceeding with a challenge to his conviction in SO. DIST.
9 CA CIVIL CASE NO. 06CV0169-DMS (RBB), the Court **DISMISSES** this action without
10 prejudice to Petitioner to proceed with his claims in that action, subject to seeking leave of Court
11 in that case to amend his pending petition to include the newly-presented claims.

12 **IT IS SO ORDERED.**

13 **DATED: February 1, 2008**

14 
15 **IRMA E. GONZALEZ** Chief Judge
16 **United States District Court**